project. The Voice Over IP project sought to utilize the Routers for eligible purposes at eligible locations. Unfortunately, Year 4 funding was denied by the SLD for such project for that year.

Thereafter, YISD reviewed extensively whether to re-seek such funding for the Voice Over IP project for Year 5 of the Program. Again, YISD proposed use of the Routers in connection with that project. A true and correct copy of some planning documentation is attached hereto as Exhibit "11" and is incorporated herein. Ultimately, though, such project was not included in the final Form 471 for Year 5 of the Program. YISD, though, planned to continue with that project in future Program years.

The high-speed wide area network was constructed by YISD during June and July, 2002. As noted above, YISD used its own funds and other non-Program sources for the original implementation of that WAN project. During that time period, since the Routers were no longer being utilized for network purposes and YISD desired to ensure the safety of the Routers for the proposed future use, YISD removed the Routers from their initial sites in the summer of 2002 and placed them in a secure storage area pending subsequent use as planned.

In any event, even if the Voice Over IP project had been included in YISD's request for Year 5 funding, such funding would have been denied. Indeed, YISD was denied all internal connections funding by the SLD sought by its Form 471 for Year 5 of the Program.

YISD appealed the decision of the SLD in the Year 5 Funding Letter to the Federal Communication Commission (the "FCC"). By FCC Order 03-313 dated December 8, 2003 in Matter of Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, et. al., CC Docket Nos. 96-45 and 97-21 (the "Ysleta Order"), the FCC effectively upheld the denial of Year 5 funding, but granted a waiver of Program rules to permit YISD to re-file its application for Year 5 funding under certain conditions.

Pursuant to the <u>Ysleta</u> Order, YISD in early 2004 did re-file for Year 5 funding. Unfortunately, by that time, due to changes in technology over the preceding 3 to 4 years, the Routers were now obsolete in terms of their use in the proposed Voice Over IP Project. In addition, since the Voice Over IP Project had been sought for Year 6 funding, the same funding was not sought with the Year 5 re-filing.

Shortly beforehand, YISD was already working on its proposed projects for Year 6 of the Program. In other words, YISD was required to plan for Year 6 projects before any final decision was made on its Year 5 projects. For Year 6 of the Program, YISD planned to utilize the Routers for the Voice Over IP project. Again, YISD wanted to re-use the Routers for an eligible project at eligible locations. On or about November 4, 2002, YISD posted its Form 470 for Year 6 of the

Program (the "Year 6 Form 470"). A true and correct copy of the Year 6 Form 470 is attached hereto as Exhibit "12" and is incorporated herein. After a procurement process, and subsequent award and signing of a contract for such project, YISD filed its Form 470 for Year 6 on January February 5, 2002 (the "Year 6 Form 471"). A true and correct copy of the Year 6 Form 471 is attached hereto as Exhibit "13" and is incorporated herein.

Once again, there was a significant delay by the SLD in making a decision on YISD request for funding, here under the Year 6 Form 471. In fact, the SLD did not make such a determination until almost 11 months after the beginning of Year 6. The SLD approved the Year 6 Form 471 by means of a Funding Commitment Decision Letter dated April 20, 2004 (the "Year 6 Funding Letter"). A true and correct copy of the Year 6 Funding Letter is attached hereto as Exhibit "14" and is incorporated herein. Again, due to the delays since the Year 6 Form 471 was filed [not to mention the Year 4 and Year 5 efforts to fund the Voice Over IP project], and the accompanying changes in technology, the Routers can no longer be reasonably utilized for the Voice Over IP project at this time.

Nevertheless, despite its numerous tries to date, YISD did not give up on its effort to reutilize the Routers for an eligible project at eligible locations. Specifically, in May 2003, YISD began planning to use undertake a proposed dynamic host configuration protocol a/k/a DHCP project, which could use the Routers. "Dynamic host configuration protocol" is a protocol for assigning dynamic IP addresses to devices on a network. This assignment can be done by either a DHCP server or an appliance such as the Routers. This method of addressing devices on a network makes it easier for adding and moving devices throughout the network. At YISD, computers and printers are constantly being added or moved at the campuses or between campuses. By setting up the computer or printer to accept a DHCP address, the DHCP appliance [here, the Routers] dynamically assigns an IP address to the device, keeps track of the IP addresses assigned, and frees up YISD staff from having to manually assign and manage IP addresses. YISD at the time had static IP addresses, maintained by servers. Those servers began to reach the end of their lifespans and began to become unusable and [due to their age and obsolecence] unrepairable. YISD had the choice of acquiring new servers for the static IP addresses under the Program, which were eligible for funding under the Program, or instead moving to the DHCP project.

Rather than seek the Program funding, and for the benefits described above, YISD decided to undertake the DHCP project. Importantly, even though YISD believes the DHCP project was eligible was Program funding, YISD did not seek or use Program funding for the DHCP project. YISD used its own or other resources fo the DHCP project. The DHCP project was commenced in October 2003 by YISD and was recently completed. To be clear, the DHCP project was first discussed before the Audit [as defined below] was concluded, and was begun almost eight months

before the Decision was issued. Under the DHCP project, each Router was returned for use in the exact same eligible school at which such Router had been initially installed for the upgrade of the initial project. The useful life of the Routers under the DHCP project is expected to be similar to that the Routers would have had if the old network had remained in place.

It is extremely important to point out that, at this time [being over one year since the Audit was completed], all of the Routers are actually in place and in use, at the same eligible schools, for an otherwise eligible project [even though YISD used its own funds for the DHCP project].

In 2003, USAC conducted an audit of the Year 3 funding under the Program at YISD, investigating a variety of projects and issues (the "Audit"). The Audit included a finding that the Routers were not used properly. Specifically, Finding 5 of the Audit stated as follows:

Finding 5 - Unused routers purchased with E-rate funds

Condition:

The 37 routers purchased with E-rate funds during FY 2000 are currently being unused in storage at the ACAC building. The routers were replaced during Year 4 with improved technology products. The beneficiary had intended to use the routers in connection with funding from Year 5, but USAC denied the beneficiary's Year 5 funding request. The beneficiary has appealed this decision, and the outcome is still unknown.

We were unable to determine the total dollar value of the 37 routers purchased with E-rate funds due to the lack of adequate descriptions on the service provider (IBM) invoices. The fixed asset listing prepared by the Accounting Department places a value of \$6,276 for each router – which would total \$232,212 for the 37 routers.

Criteria.

USAC does not provide specific guidance regarding the timeframe that products purchased with E-rate funds must be used. However, using the routers for such a limited time would tend to indicate poor controls over the implementation of technology products purchased with E-rate funds, and could also be viewed as a waste of USAC funds.

YISD responded to that finding. A true and correct copy of an excerpt of the YISD Audit response, relative to such finding, is attached hereto as Exhibit "15" and incorporated herein.

The Decision was issued on May 13, 2004, pursuant to the Audit. The Decision states in

relevant part:

After a thorough investigation, it has been determined that SLD will seek recovery for items not being used for educational purposes. During an audit it was noted that 37 routers were in storage and not being used. The routers cost is \$6,276 each. As a result, \$208,999.80 will need to be recovered.

YISD disputes that contention, and hereby appeals the Decision in accordance with the Appeal Procedures of the SLD.

Attached hereto and incorporated herein as Exhibit "16" and incorporated herein is an Affidavit of Richard Duncan.

Arguments and Authorities

The replacement of the Routers by YISD did not violate any rule or policy in place during the relevant time period.

There was no specific FCC rule in place at the time of the procurement of the Routers, the installation of the Routers, or the removal of the Routers, which required the Routers to be in place at an eligible school for a minimum period of time or which prohibited removal or transfer of the Routers [except for transfers for compensation]. Neither USAC nor the SLD had any published policy in place regarding such issue at such times, either. Indeed, the Audit admits that "USAC does not provide specific guidance regarding the timeframe that products purchased with E-rate funds must be used."

It is also important to note that FCC Order No. 02-08 dated January 16, 2002, entitled "Notice of Proposed Rule Making and Order" states in relevant part, in paragraph 37, as follows:

Our rules provide that eligible services purchased at a discount "shall not be sold, resold, or transferred in consideration for money or any other thing of value." Nothing in our rules, however, prevents transferring equipment obtained with universal service discounts from the eligible recipient to another entity without consideration for money or anything of value. We have received reports from state authorities, schools and libraries, and the Administrator that some recipients are replacing, on a yearly or almost-yearly basis, equipment obtained with universal service discounts, and transferring that equipment to

⁴ 47 C.F.R. § 54.617.

other schools or libraries in the same district that may not have been eligible for such equipment.⁵

Although we recognize that schools and libraries may legitimately desire to upgrade their equipment frequently as a result of the rapid pace of technological change, we seek comment on whether it is appropriate to balance this desire against the impact of such action on other parties seeking discounts under the program. We seek comment on whether the program's goals would be improved by requiring that schools and libraries make significant use of the discounted equipment that they receive, before seeking to substitute new discounted equipment. In particular, we seek comment on whether there may be insufficient incentives in the schools and libraries mechanism to prevent wasteful or fraudulent behavior, without imposing restrictions on these transfers of equipment. We specifically seek comment on whether, as a condition of receipt of universal service discounts, we should adopt measures to ensure that discounted internal connections are used at the location and for the use specified in the application process for a certain period of time.

In short, the FCC itself recognized that there was no rule in place preventing transfers or replacement of items purchased with Program funds between facilities or entities, so long as no consideration of value passed. Indeed, the FCC states that "[n]othing in our rule" prohibits such conduct. The FCC therefore sought comments from the public on whether or not such a rule should be adopted, and if so, what sort of restrictions should be included in such rule. Importantly, the FCC did not indicate in such Order that even annual replacement of goods using Program funds violated of any other Program rules or necessarily constituted "waste, fraud, or abuse".

It should also be pointed out that the Semiannual Report to Congress [October 1, 2003 - March 31, 2004] of the Office of the Inspector General of the FCC provides during a description of the OIG's own audits of certain districts under the Program, at page 18 of such report in relevant part as follows:

⁵ For example, in Funding Year 3, schools that were not eligible for at least an 82 percent discount did not receive discounts for internal connections due to limited program funds. However, a school eligible for a 90 percent discount in Funding Year 3 that received internal connections could have transferred that equipment to another school in the same school district that was ineligible for Funding Year 3 discounts for internal connections due to its lower discount rate. See 47 C.F.R. § 54.507(g) (describing rules of priority); Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Further Notice of Proposed Rulemaking, FCC 01-143 (rel. April 30, 2001) (describing funding priorities for Funding Year 3).

Equipment not being installed or operational. Program rules require that nonrecurring services be installed by a specified date. However, there is no specific FCC rule requiring beneficiaries to use equipment in a particular way, or for a specified period of time, or to full efficiency. Commission staff have provided guidance stating that if the equipment was uninstalled (i.e. - still in a box) that would represent a rule violation. However, Commission staff have also provided guidance stating that the rules do not require beneficiaries effectively utilize the services provided or that the beneficiaries maintain continuous network or Internet connectivity once internal connections are installed.

The Office of Inspector General of the FCC does not indicate that removal of equipment violates Program rules. Indeed, according to that FCC report, even inefficient, incomplete, or improper use of the equipment is not in violation of Program rules.

In FCC Order 03-323 dated December 23, 2003, entitled "Third Report and Order and Second Further Notice of Proposed Rulemaking", the FCC adopted new rules governing a number of Program areas. In such Order, the FCC noted in relevant part, in paragraph 9, as follows:

[N]othing in our current rules expressly preclude entities with 90 percent discounts from replacing, on a yearly or almost-yearly basis, equipment obtained with universal service discounts, and transferring that equipment to other entities with lower discount percentages that otherwise would not receive funding for such equipment due to the exhaustion of the capped amount. The Act and our existing rules provide only that equipment purchased with universal service discounts "shall not be sold, resold, or transferred in consideration for money or any other thing of value."

Again, the FCC admitted that even annual replacement and transfer of equipment acquired with Program funds did not violate Program rules.

Pursuant to such December 2003 Order, however, the FCC decided to adopt the following new rule, found at 47 C.F.R. §54.513(c), reading as follows (the "New FCC Rule"):

Eligible services and equipment components of eligible services purchased at a discount under this subpart shall not be transferred, with or without consideration of money or any other thing of value, for a period of three years after purchase, except that eligible

⁶ See 47 C.F.R. § 54.617.

⁷ 47 U.S.C. § 254(h)(3); 47 C.F.R. § 54.513.

services and equipment components of eligible services may be transferred to another eligible school or library in the event that the particular location where the service originally was received is permanently or temporarily closed. If an eligible service or equipment component of a service is transferred due to the permanent or temporary closure of a school or library, the transferor must notify the Administrator of the transfer, and both the transferor and recipient must maintain detailed records documenting the transfer and the reason for the transfer for a period of five years.

This FCC Order involved a matter of rule changes, as well as proposed rulemaking, but the New FCC Rule relating to equipment transfers is the only actual rule change relevant to this discussion.

This FCC Order provides that its rule changes, including the New FCC Rule, would not be effective until a later date, indicating at paragraph 147:

IT IS FURTHER ORDERED that Part 54 of the Commission's rules, 47 C.F.R. Part 54, IS AMENDED as set forth in Appendix A attached hereto, effective thirty (30) days after the publication of this Third Report and Order in the Federal Register.

Such FCC Order was published in the Federal Register on February 10, 2004. In paragraph 67 of the Federal Register notice, the FCC provides as follows:

Part 54 of the Commission's rules, is amended as set forth, effective March 11, 2004 except for §54.513(c) which contains information collection requirements that have not been approved by the Office of Management Budget (OMB). The Commission will publish a document in the Federal Register announcing the effective date of that section.

Consequently, the New FCC Rule was not made effective on March 11, 2004 along with the rest of the rule changes. Instead, its effective date would occur on an indefinite date in the future. A search of the Federal Register website, the FCC website, and the SLD/USAC website as of June 30, 2004, does not indicate that the effective date of the New FCC Rule has yet been published by the FCC. To YISD's knowledge, the New FCC Rule is not even effective as of this date. In any event, it is clear the New FCC Rule was not intended to be retroactive, by its terms and the FCC orders.

Nevertheless, USAC is essentially treating the New FCC Rule as retroactive. Effectively, the Decision is wrongfully imposing the New FCC Rule retroactively upon YISD with respect to the Routers. It is generally impermissible for a law to be used to punish or sanction someone for conduct occurring prior to the adoption of the law. Indeed, in <u>Landgraf v. USI Film Products</u>, 511 U.S. 244, 265-267, 114 S.Ct. 1483 (1994), the United States Supreme Court, in denying the

retroactive effect of a federal law, pointed out in relevant part:

... the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." Kaiser, 494 U.S., at 855, 110 S.Ct., at 1586 (SCALIA, J., concurring). In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.

It is therefore not surprising that the antiretroactivity principle finds expression in several provisions of our Constitution. ... These provisions demonstrate that retroactive statutes raise particular concerns.

In certain circumstances, retroactive legislation may be permissible, but the intent to make the law retroactive must be clear. <u>Landgraf</u>, 511 U.S. 268-271. Here, the FCC certainly did not intend to make the New FCC Rule retroactive, so such exception is inapplicable. Accordingly, it is a violation of the constitutional and other rights of YISD for the Decision to effectively apply the New FCC Rule retroactively.

Here, the New FCC Rule was adopted several years after the conduct in question of the YISD, well before YISD would have been on notice. The New FCC Rule also was clearly not intended by the FCC to be retroactive.

⁸ See <u>Kaiser Aluminum & Chemical Corp. v. Bonjorno</u>, 494 U.S. 827, 842-844, 855-856, 110 S.Ct. 1570, 1579-1581, 1586-1587, 108 L.Ed.2d 842 (1990) (SCALIA, J., concurring). See also, e.g., <u>Dash v. Van Kleeck</u>, 7 Johns. *477, *503 (N.Y.1811) ("It is a principle of the English common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect") (Kent, C.J.); Smead, The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence, 20 Minn.L.Rev. 775 (1936).

⁹ See <u>General Motors Corp. v. Romein</u>, 503 U.S. 181, 191, 112 S.Ct. 1105, 1112, 117 L.Ed.2d 328 (1992) ("Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions"); Munzer, A Theory of Retroactive Legislation, 61 Texas L.Rev. 425, 471 (1982) ("The rule of law ... is a defeasible entitlement of persons to have their behavior governed by rules publicly fixed in advance"). See also L. Fuller, The Morality of Law 51-62 (1964) (hereinafter Fuller).

In its orders discussed above, the FCC did not indicate that even serial, annual replacement of items acquired using Program funds and their transfer to ineligible locations violated any FCC rules or Program requirements. Instead, the FCC stated that nothing in its rules prohibited such conduct. The FCC's Office of Inspector General also found no violations for similar actions. If the FCC did not find violations with that sort of conduct, which is much, much more egregious than anything USAC alleges YISD is to have done with respect to the Routers, it is clear that YISD's conduct with regard to the Routers does not violate any Program rules.

It is very important to remember that the replacement of the Routers was not part of serial, annual replacement by YISD [as apparently occurred at other districts], but instead part of a major re-configuration of the entire computer network of YISD into a wide area network. This was a one-time change, not a annual event. Such re-configuration was itself the result of changed circumstances required in order to serve the educational requirements of YISD faculty and students. Moreover, rather than simply move the Routers to ineligible locations [as apparently occurred at other districts], YISD continually sought for years [and continued to seek] a functional and compatible use of the Routers at eligible locations for an eligible project.

YISD did not wish the Routers to go un-used; indeed, YISD paid for a portion of the costs of the Routers and also paid substantial amounts for 20 similar routers for ineligible schools. Of course, it also needs to be made clear that, under the DHCP project beginning in October 2003 and recently competed, all of the Routers are in fact now in use at each of the eligible locations to which they had been originally assigned.

Quite simply, there was no contemporaneous rule or policy in place prohibiting YISD from engaging in the complained-of conduct, which YISD could have violated at the time. YISD's conduct was also reasonable and justifiable in the circumstances. In any event, the Routers are now in use at the eligible sites.

<u>Under these circumstances, YISD's replacement of the Routers did not constitute "waste, fraud, or abuse"</u>.

There was no waste, fraud, or abuse involved in the removal of the Routers by YISD. YISD made reasonable business decisions on the acquisition of the Routers, the wide area network installation, the removal of the Routers, and the proposed re-uses of the Routers. YISD also took great care to try to re-use the Routers for other projects under the Program, and continued to seek to do so.

The Audit states in this regard, after noting that there is no USAC authority on the issue:

...using the routers for such a limited time would tend to indicate poor controls over the implementation of technology products purchased with E-rate funds, and could also be viewed as a waste of USAC funds".

Please note that the Audit conclusion does not state that there is in fact a waste of Program funds, but instead one could possibly view it as a waste. The auditors' language recognizes that the issue is not conclusive.

YISD acted reasonably throughout this process. Its decision to conduct a network upgrade under Year 3 of the Program was reasonable, based at minimum upon its 1998 Technology Plan and its then-current anticipated needs. It was also reasonable for YISD not to acquire and install a high-speed wide area network during Year 3 of the Program, but instead do the upgrade, in light of the lesser needs at the time and the much higher costs for such WAN service at the time. There was no intent by YISD to not use or to replace the Routers when they were sought for Year 3 funding. Indeed, YISD concurrently acquired similar routers at a large number of ineligible locations at the same time using its own funds; that acquisition is further evidence of YISD's intentions at that time. YISD's subsequent decision to change its computer network to a highspeed wide area network was also reasonable in light of, among other things, the 2001 Technology Plan, the changed instructional and other needs of YISD, and the reduced costs of WAN service in the interim. Since the Routers could not be used with the wide area network, it was reasonable for YISD to not use the Routers for its network. YISD also did not take such step lightly, among other things, due to its own direct financial investment in the similar routers for ineligible campuses. Because there might be a risk of loss or damage to the Routers if kept in place unused, it was reasonable for YISD to remove the Routers and place them in a centralized, secure location, pending re-use. It was also reasonable for YISD to seek to re-use the Routers for its Year 4 Voice Over IP project and for its Year 6 Voice Over IP project. YISD was also being reasonable in seeking to re-use, and in fact now using, the Routers for the DHCP project.

YISD's conduct is and has been both reasonable and justifiable. YISD did not try to abuse the system. YISD made reasonable determinations and decisions, which ultimately led to the Routers no longer being needed for their original purpose. Even so, rather than have the Routers go un-used, YISD actively sought to use the Routers for other eligible projects at eligible facilities, in order to give effect to YISD's original intent to use the Routers for Program projects. It might be noted that, if the SLD had more timely approved Year 6 funding [delayed almost 11 months after the beginning of that Program year], the Routers likely could have been used for the Voice Over IP project some time ago.

Of course, in any event, the Routers are actually now in use at the eligible schools. In fact, each Router is in place and being used at the same eligible school at which it was originally

located. The Routers have not been "wasted". They are being used for an eligible project [albeit such project was put in place using YISD's own funds] at the same eligible locations. There is no "waste" here.

Once again, this is not a situation where YISD upgraded the same system every year using Program funds, which was a problem that apparently occurred at a number of locations nationwide as indicated by the above-quoted FCC orders. The FCC orders and OIG report did not state that such conduct represented "waste, fraud, or abuse" under the Program. The FCC orders and report in fact admit that such conduct did not violate any Program rules. If the FCC did not find that such egregious conduct constituted "waste, fraud, or abuse", there are no grounds for the Decision to essentially find that YISD conduct as to the Routers constituted "waste, fraud, or abuse", either.

Consequently, there was no "waste, fraud, or abuse" by YISD concerning the Routers which would be grounds for requiring return of the Disputed Funds.

The Decision was arbitrary and capricious, and is not justified.

YISD believes that the Decision is arbitrary and capricious.

In the first place, as noted by the FCC Orders described above, there appears to have been a significant number of situations where the district involved would engage in serial, annual replacement of equipment acquired with Program funds, and either cease use of such equipment or move such equipment to an ineligible location. YISD is not alleged to have engaged in such conduct. Based upon review of the FCC website, media, and other sources, it does not appear that USAC/SLD has taken any action against those districts engaging in such egregious conduct. It is unreasonable for YISD to be the subject of proceedings to recover the Disputed Funds under circumstances what were much less of concern than the conduct of these other districts.

The Decision is also arbitrary and capricious since it may represent apparent improper bias or retaliation by USAC against YISD arising out of the incidents giving rise to the <u>Ysleta</u> Order and/or the rulings therein. YISD vigorously challenged USAC and SLD decisions in those proceedings, and ultimately received what was in effect a partial victory. YISD still wonders why it was selected as the first school district nationwide to be denied Year 5 funding by USAC /SLD for such issues, even though its situation was less egregious than many other districts. Now, YISD questions why it is being singled-out for recovery of funds even though other districts apparently engaged in much more egregious conduct without sanction or penalty. That is not fair, and does not seem reasonable. An issue necessarily arises as to whether inappropriate motivations are present.

Conclusion

Based upon the foregoing, additionally and in the alternative, the Decision should be reversed in its entirety. Under these circumstances, there are no legitimate grounds for the SLD to seek recovery of the Disputed Funds from YISD.

If you need to contact a representative of YISD regarding this matter, you may direct that inquiry to:

> Clyde A. Pine, Jr. Mounce, Green, Myers, Safi & Galatzan 100 N. Stanton, Suite 1700 El Paso, Texas 79901 or P.O. Box 1977 El Paso, Texas 79950

Phone: (915) 532-2000 Telecopy: (915) 541-1548 E-Mail: pine@mgmsg.com.

My signature below constitutes the signature of YISD's authorized representative. In any event, Richard Duncan's signature on his affidavit may be considered as well. Thank you for your consideration and anticipated cooperation with respect to the foregoing. Please contact me immediately if you have any questions, comments, or objections with regard to the foregoing, or if you need additional information.

Very truly yours,

MOUNCE, GREEN, MYERS, SAFI & GALATZAN

A Professional Corporation

cc: Ysleta Independent School District

Encl. (see attached list)

INDEX OF EXHIBITS

<u>Item</u>	Ex. No.
1998 Technology Plan	1
2001 Technology Plan	2
Year 3 Form 470	3
Year 3 Contract	4
Year 3 Form 471	5
Year 3 Funding Letter	6
illustration of YISD wide area network	7
Year 4 Form 470	8
Year 4 Form 471	9
Year 4 Funding Letter	10
planning documentation for possible Year 5 Voice Over IP project	11
voice over it project	11
Year 6 Form 470	12
Year 6 Form 471	13
Year 6 Funding Letter	14
excerpt of the YISD Audit response	15
Affidavit of Richard Duncan	16



Universal Service Administrative Company Schools & Libraries Division

Demand Payment Letter

Funding Year 2000: 7/01/2000 - 6/30/2001

April 19, 2005

Bill Richardson YSLETA INDEP SCHOOL DISTRICT **9600 SIMS DR** EL PASO, TX 79925 7200

Re: Form 471 Application Number: 179273

Funding Year:

Applicant's Form Identifier:

Router/Campus Network Elec

Billed Entity Number:

142115

FCC Registration Number:

SPIN Name:

International Business Machines Corporation

Service Provider Contact Person: D'Ann Howe

You were previously sent a Recovery of Erroneously Disbursed Funds Letter informing you of the need to recover funds for the Funding Request Number(s) (FRNs) listed on the Funding Disbursement Report (Report) attached to the Recovery of Erroneously Disbursed Funds Letter. A revised copy of that Report is attached to this letter. Immediately preceding the Report, you will find a guide that defines each line of the Report.

In the Order on Reconsideration and Fourth Report and Order (FCC 04-181, rel. July 30, 2004) (Fourth Report and Order), the FCC "conclude[d] that recovery actions should be directed to the party or parties that committed the rule or statutory violation in question." The FCC also directed the Universal Service Administrative Company (USAC) to determine to whom recovery should be directed in individual cases. In making such a determination USAC must "consider which party was in a better position to prevent the statutory or rule violation, and which party committed the act or omission that forms the basis for the statutory or rule violation."

Pursuant to the Fourth Report and Order the revised recovery approach applies to all FRNs for which USAC had not yet issued a first Demand Payment Letter as of September 17, 2004 (the effective date of the Order). The purpose of this letter is to:

- Notify you of the exact amount of recovery being directed towards you.
- · Give you an opportunity to appeal USAC's determination that recovery should be directed towards you. Please note that the deadline for appealing the decision to seek recovery of improperly disbursed funds is determined by the date of the Recovery of Erroneously Disbursed Funds Letter and not this letter.



Demand payment of the funds and give you instructions for repaying the funds.

The balance of this debt is due within 30 days from the date of this letter. Failure to pay the debt within 30 days from the date of this letter could result in interest, late payment fees, administrative charges and implementation of the "Red Light Rule." Please see the "Informational Notice to All Universal Service Fund Contributors, Beneficiaries, and Service Providers" at www.universalservice.org/new/2004.asp#083104 for more information regarding the consequences of not paying the debt in a timely manner.

If the Schools and Libraries Division (SLD) has determined that both the applicant and the service provider are responsible for a program rule violation, then, pursuant to the Fourth Report and Order, the SLD will seek recovery of the improperly disbursed amount from BOTH parties and will continue to seek recovery until either or both parties have fully paid the debt. If the SLD has determined that both the applicant and the service provider are responsible for a program rule violation, this is indicated in the Disbursed Funds Recovery Explanation in the Report following this letter.

If the SLD is attempting to collect all or part of the debt from both the applicant and the service provider, then you should work with the service provider to determine who will be repaying the debt and to avoid duplicate payment. Please note, however, that the debt is the responsibility of both the applicant and service provider. Therefore, you are responsible for ensuring that the debt is paid in a timely manner.

Please remit payment for the full Funds to be Recovered from Service Provider amount shown in the attached Report. To ensure that your payment is properly credited, please include a copy of the Report with your check. Make your check payable to the Universal Service Administrative Company (USAC).

If sending payment by U. S. Postal Service or major courier service (e.g. Airborne, Federal Express, and UPS) please send check payments to:

Universal Service Administrative Company 1259 Paysphere Circle Chicago, IL 60674

If you are located in the Chicago area and use a local messenger rather than a major courier service, please address and deliver the package to:

Universal Service Administrative Company Lockbox 1259 540 West Madison 4th Floor Chicago, Il 60661

Local messenger service should deliver to the Lockbox Receiving Window at the above address.

Payment is due within 30 days from the date of this letter.

Complete program information is posted to the SLD section of the USAC web site at www.sl.universalservice.org. You may also contact the SLD Technical Client Service Bureau by e-mail using the "Submit a Question" link on the SLD web site, by fax at 1-888-276-8736 or by phone at 1-888-203-8100.

TO APPEAL THIS DECISION:

If you wish to appeal the decision, your appeal must be received or postmarked within 60 days of the date of this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. In your letter of appeal:

- 1. Include the name, address, telephone number, fax number, and e-mail address (if available) for the person who can most readily discuss this appeal with us.
- 2. State outright that your letter is an appeal. Identify the date of the Demand Payment Letter and the FRN(s) you are appealing. Your letter of appeal must include the Billed Entity Name, the Form 471 Application Number, Billed Entity Number, and the FCC Registration Number (FCC RN) from the top of your letter.
- 3. When explaining your appeal, copy the language or text from the Demand Payment Letter that is the subject of your appeal to allow the SLD to more readily understand your appeal and respond appropriately. Please keep your letter specific and brief, and provide documentation to support your appeal. Be sure to keep copies of your correspondence and documentation.
- 4. Provide an authorized signature on your letter of appeal.

If you are submitting your appeal electronically, please send your appeal to appeals@sl.universalservice.org using your organization's e-mail. If you are submitting your appeal on paper, please send your appeal to: Letter of Appeal, Schools and Libraries Division, Box 125 - Correspondence Unit, 80 South Jefferson Road, Whippany, NJ 07981. Additional options for filing an appeal can be found in the "Appeals Procedure" posted in the Appeals Area of the SLD section of the USAC web site or by contacting the Client Service Bureau. We strongly recommend that you use the electronic appeals options.

While we encourage you to resolve your appeal with the SLD first, you have the option of filing an appeal directly with the Federal Communications Commission (FCC). You should refer to CC Docket No. 02-6 on the first page of your appeal to the FCC. Your appeal must be received or postmarked within 60 days of the date of this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street SW, Washington, DC 20554. Further information and options for filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference Area of the SLD section of the USAC web site, or by contacting the Client Service Bureau. We strongly recommend that you use the electronic filing options.

Universal Services Administrative Company Schools and Libraries Division

cc: D'Ann Howe International Business Machines Corporation

A GUIDE TO THE FUNDING DISBURSEMENT REPORT

Attached to this letter will be a report for each funding request from the application cited at the top of this letter for which a Recovery of Improperly Disbursed Funds is required. We are providing the following definitions.

FUNDING REQUEST NUMBER (FRN): A Funding Request Number is assigned by the SLD to each individual request in a Form 471 once an application has been processed. This number is used to report to applicants and service providers the status of individual discount funding requests submitted on a Form 471.

SERVICES ORDERED: The type of service ordered from the service provider, as shown on Form 471.

SPIN (Service Provider Identification Number): A unique number assigned by the Universal Service Administrative Company to service providers seeking payment from the Universal Service Fund for participating in the universal service support programs.

SERVICE PROVIDER NAME: The legal name of the service provider.

CONTRACT NUMBER: The number of the contract between the applicant and the service provider. This will be present only if a contract number was provided on the Form 471.

BILLING ACCOUNT NUMBER: The account number that your service provider has established with you for billing purposes. This will be present only if a Billing Account Number was provided on the Form 471.

SITE IDENTIFIER: The Entity Number listed on Form 471, Block 5, Item 22a. This number will only be present for "site specific" FRNs.

FUNDING COMMITMENT: This represents the amount of funding that SLD had reserved to reimburse you for the approved discounts for this service for this funding year.

FUNDS DISBURSED TO DATE: This represents the total funds that have been paid to the identified service provider for this FRN as of the date of this letter.

FUNDS TO BE RECOVERED FROM APPLICANT: This represents the amount of improperly disbursed funds to date as a result of rule violation(s) for which the applicant has been determined to be responsible. These improperly disbursed funds will have to be recovered from the applicant.

DISBURSED FUNDS RECOVERY EXPLANATION: This entry provides the reason why recovery is required.

Funding Disbursement Report Form 471 Application Number: 179273

Funding Request Number:

379524

Services Ordered:

INTERNAL CONNECTIONS

SPIN:

143005607

Service Provider Name:

International Business Machines Corporation

Contract Number:

20-1206-052CSP

Billing Account Number:

20-1206-052CSP

Site Identifier:

142115

Funding Commitment:

\$320,903.72

Funds Disbursed to Date:

\$320,903.72

Funds to be Recovered from Applicant: \$208,990.80

\$208,000,80

Disbursed Funds Recovery Explanation:

On 5/13/2004 a letter was sent to the service provider, International Business Machines Corporation, advising them of a recovery of funds for this Funding Request Number. Please see the following paragraph for the violation and original decision:

"After a thorough investigation, it has been determined that SLD will seek recovery for items not being used for educational purposes. During an audit it was noted that 37 routers were in storage and not being used. The routers cost is \$6,276 each. As a result, \$208,990.80 will need to be recovered."

FCC rules require that applicants have secured all the necessary resources to make effective use of the equipment and that the equipment is utilized for an educational purpose. Since a review of your commitment has revealed that equipment is not being utilized according to program rules, SLD must seek recovery of all funds improperly disbursed that are associated with the equipment not being utilized. Accordingly, the SLD is seeking recovery of \$208,990.80. Since this violation was caused by an act or omission of the applicant, recovery will be sought from the applicant and not the service provider.



A PROFESSIONAL CORPORATION ATTORNEYS AND COUNSELORS AT LAW

WILLIAM J MOUNCE*
S. ANTHONY SAF!
H. KEITH MYERS
CARL H. GREEN
JOHN S. BIRKELBACH
KURT G. PAXSON
MARK C. WALKER
NORMAN J. GORDON
STEVEN L. HUGHES
MARK D. DORE
KARIN A. CARSON
CLYDE A. PINE. JR.*
BRUCE A. KOEHLER

STEPHEN H. NICKEY DARRYL S. VEREEN ANDRES E. ALMANZAN RAYMOND BENAVIDES, III WESLEY G. JOHNSON* ANGELICA A. SAENZ ELIZABETH MELBY RUHMANN

MORRIS A. GALATZAN (1911-1999) WILLIAM T. KIRK (1940-2002)

* ALSO MEMBER OF NEW MEXICO BAR

TELEPHONE: (915) 532-2000

MAILING ADDRESS: P.O. BOX 1977 EL PASO, TEXAS 79950-1977

STREET ADDRESS: 100 N. STANTON, SUITE 1700 EL PASO, TEXAS 79901-1448

FACSIMILE: (915) 541-1526 WEBSITE: WWW.MGMSG.COM

May 12, 2005

Via E-Mail [appeals@sliunversalservice.org]

Letter of Appeal Schools and Libraries Division Box 125 - Correspondence Unit 80 South Jefferson Road Whippany, New Jersey 07891

Re:

Letter of Appeal for Ysleta Independent School District

Funding Request Number 379524

Funding Year 2000-2001

SPIN: 143005607

Provider: International Business Machines

Billing Acct. No. 20-1206-052CSP

Dear Sir or Madam:

Introduction

On behalf of the Ysleta Independent School District ("YISD"), this letter and accompanying documentation represent the Letter of Appeal of YISD to that certain Demand Payment Letter dated April 19, 2005 (the "Decision") from the Universal Service Administrative Company ("USAC") for the Schools and Libraries Division (the "SLD") of the Federal Communication Commission (the "FCC"). The Decision, the relevant part of which is set forth below in the text of this letter, demands the sum of \$208,990.80 from YISD (the "Disputed Funds") in connection with YISD's Form 471 Application Number 179273 (the "Year 3



ALFA:
American
Law Firm
Association

Form471") for Funding Year 2000-2001 a/k/a "Year 3" of the E-Rate Program (the "Program"). This Letter of Appeal is timely made within sixty days of the date of the Decision.

The Decision was not the first such letter received by YISD from USAC regarding the Disputed Funds. Specifically, YISD received a Recovery of Disbursed Funds Letter dated May 13, 2004 regarding the Disputed Funds (the "Recovery Letter"). YISD timely filed a Letter of Appeal dated July 6, 2004, appealing the Recovery Letter (the "Prior Letter of Appeal"). No ruling on the appeal has yet been made on the prior Letter of Appeal, to YISD's knowledge.

For the reasons set forth below, the Decision should be reversed and overturned in its entirety.

Factual Background

In order to understand the erroneous conclusion in the Decision, it is important to review the factual circumstances of the conduct of YISD upon which the Decision is apparently based.

In the first place, YISD adopted a Long-Range Information Technology Plan in March 1998 (the "1998 Technology Plan"). A true and correct copy of the 1998 Technology Plan, with supplements and amendments, was attached as Exhibit "1" to the Prior Letter of Appeal and is incorporated herein.² The 1998 Technology Plan contemplated that YISD would acquire the necessary technology to establish and maintain an adequate computer network at YISD.

As used in the technology area at the time, the term "network" referred to a system of computers interconnected by telephone lines or cables, permitting the sharing of information and data amongst those computers. The term "router" is used to describe a device which handle message transfers within or between computer networks, by forwarding packets of data according to set protocols and instructions.

¹ The SLD used to refer to funding years as Year 1, Year 2, etc., but changed the terminology of the Year 5 funding year to Year 2002, with similar changes for subsequent years of the Program. This Letter of Appeal will use the term "Year 3" to refer to Funding Year 2000-2001, "Year 4" to refer to Funding Year 2001-2002, "Year 5" to refer to Funding Year 2002-2003, "Year 6" to refer to Funding Year 2003-2004, and "Year 7" to refer to Funding Year 2004-2005.

² The Exhibits needed for this Letter of Appeal are identical to those exhibits attached to the Prior Letter of Appeal, and have the same numbering sequence. Such exhibits are voluminous. Rather than burden the SLD with even more sets of such exhibits, in this Letter of Appeal, YISD is incorporating such exhibits by reference. Due to the direct, close relationship between this Letter of Appeal and the Prior Letter of Appeal, that approach appears to be appropriate here. If, for any reason, the SLD believes that further sets of such exhibits are needed for this Letter of Appeal, please notify YISD immediately so that it can promptly provide the same.

The 1998 Technology Plan was later superseded by an Information Technology Plan 2001-2004 (the "2001 Technology Plan"). A true and correct copy of the 2001 Technology Plan, with supplements and amendments, is attached to the Prior Letter of Appeal as Exhibit "2" and is incorporated herein. The 2001 Technology Plan also contemplated the acquisition and maintenance of a sufficient computer network at YISD facilities.

In 1999, YISD had a limited computer network in place. YISD had three IBM 6611 routers and more than fifty Kentrox CSU/DSU's [one for each school] located at Central Office. These units then connected via a T1 line to another Kentrox CSU/DSU at each campus and into an IBM 2210 router. At the campuses, connectivity from the desktop to the network was accomplished through IBM 8224 Ethernet Stackable Hubs. At YISD's Central Office, connectivity from the desktop to the network was done with IBM 8260 Ethernet Blade Center Hubs. The IBM 2210 routers were later taken off the market.

Such network of YISD, however, was obsolete and was insufficient to meet the educational needs of YISD students and the goals of the 1998 Technology Plan. YISD then decide to upgrade aspects of its existing computer network.

Pursuant to the 1998 Technology Plan, YISD decided to seek funding under Year 3 of the Program for various goods and services related to such network upgrade. On November 11, 1999, YISD posted a Form 470 on the SLD website in accordance with Program rules for "Router/Campus Network Electronics" (the "Year 3 Form 470"). A true and correct copy of the Year 3 Form 470 is attached hereto as Exhibit "3" and is incorporated herein.

After a competitive procurement process beginning on November 16, 1999, YISD awarded a contract to International Business Systems ("IBM") to provide the goods and services for the network electronics upgrade. A contract and statement of work between YISD and IBM for such work was signed on January 12, 2000 (the "Year 3 Contract"). A true and correct copy of the Year 3 Contract is to the Prior Letter of Appeal as Exhibit "4" and is incorporated herein.

Thereafter, YISD filed the Year 3 Form 471 with the SLD on or about January 17, 2000. A true and correct copy of the Year 3 Form 471 is attached hereto as Exhibit "5" and is incorporated herein. The Year 3 Form 471 and the Year 3 Contract provided for the installation, among other things, Cisco 2650 routers, installed, configured and tested, including implementation documentation at eligible YISD facilities specified for that funding year (the

³ The Year 3 Form 470 is one of several Form 470s posted by YISD at the time, but is the one at issue in this Letter of Appeal. For Year 3 of the Program, YISD submitted and treated separately particular projects. The Year 3 documentation described herein relates to that for the network electronics project. Similarly, the attached documentation for later Program years relates only to the relevant projects, and not to all projects for that year.

"Routers"). It should also be pointed out that, as a matter of maintaining equity between YISD campuses, YISD also concurrently acquired and installed similar routers at over 20 schools [not eligible for Program funding], using its own funds and resources.

In short, the Year 3 Contract proposed replacement of the old routers with the Routers. YISD replaced these pre-existing routers for two primary reasons. In the first place, the IBM routers that were part of the original serial network were aging and their maintenance costs were becoming greater each year and units were beginning to fail and replacements were becoming scarce. Second, the IBM routers only supported 1 ethernet interface per router. This did not allow the district to accommodate the NetSchools Project, which had computers set up on a separate IP address scheme. It is also important to keep in mind, that, at the time of request for funding for the upgrade for such old routers, the high-speed WAN service [described further below] was not an offering that was fundable under Program guidelines. Even if it had been, it was cost-prohibitive to make the change at the time as the service offering far exceeded what the YISD found to be a reasonable price for the service at that time; subsequently, the pricing became much more favorable]. The decision to upgrade the old routers was the only available, reasonable solution at that time.

The SLD approved the Year 3 Form 471 by means of a Funding Commitment Decision Letter dated May 5, 2000 (the "Year 3 Funding Letter"). A true and correct copy of the Year 3 Funding Letter is attached to the Prior Letter of Appeal as Exhibit "6" and is incorporated herein.

Between October 25, 2000 and November 5, 2000, the Routers were installed at the various YISD facilities, in accordance with the terms and conditions of the Year 3 Contract. All of the Routers were in fact installed at eligible facilities, at such locations and in such numbers as described in the Year 3 Form 471. The Routers were thereafter in fact used for the network operations at YISD.

Upon further review and reflection, and additional research and investigation, YISD determined that its existing computer network, even with the upgrades including the Routers, was insufficient to satisfy the ever-changing needs of its students and the ever-increasing demands for network capacity and speed. Changed circumstances required YISD to explore alternative methodologies of configuring its computer network, in order to meet instructional and related needs.

After extensive review, YISD decided that a "High-speed wide area network that utilized layer 3 switching" or "High-speed WAN" should be established as the network methodology for YISD facilities. A "High-speed wide area network", in this context, means a computer network, usually constructed with leased high-speed [100 megabit] fiber optic lines, that provides coverage throughout the extensive YISD service area. It differs from the previous network by using layer 3 switching instead of routing, which increases network performance, and efficiency as well

improves configuration flexibility and allows the use of standard Ethernet between locations, removing additional protocols from the transport. The components of a high-speed wide area network include a direct connection to the campus distribution switch, being a Cisco Catalyst 4908, via a managed 100 megabit leased fiber connection. The 4908 distribution switch was in place in conjunction with a network electronics upgrade that had been done in a previous year, and used in conjunction with the previous routed serial network. YISD's intent in removing the Routers after the high-speed WAN upgrade was to avoid theft or damage for two reasons: first for the fiscal liability associated with any theft or damage and second to ensure that the Routers would be available for use with a proposed Voice Over IP project that had been submitted to the SLD as a funding request.

The chief benefits of a high-speed wide area network over the old network were improved performance, additional bandwidth available for future projects such as Voice Over IP, streaming video, point to point video, or video on demand as well as other bandwidth intensive applications that were listed in the then-current Technology Plan. One of the chief complaints from YISD campuses that were utilizing the old network to do classroom work assignments via the Internet or using other network resources was that it was too slow. This slow-speed was due to saturation of the T-1 lines that previously provided service at YISD. Essentially, classroom Internet usage rates increased unexpectedly at YISD and demands on the system increased for that reason and due to increasing file sizes. One must also keep in mind that, during such time frame, the number and size of files or presentations available on the Internet for educational purposes also increased significantly. In other words, more websites often had more large, video or multi-media presentations available for review, contrary to prior times. With the old network, it was difficult, if not impractical, for YISD students to fully utilize such educational resources. More importantly, due to the slowness of the old network, it was often difficult for students to be able to even gain access to the Internet. Getting logged onto the Internet had become such a slow process that many teachers and students simply stopped trying to do so. In other cases, more persistent persons were able to get access, but the remaining classroom time to utilize the Internet resources was significantly reduced due to such delays. To be clear about the low speed of the old network, it needs to be pointed out that the Internet access speed on the old network was slower than a basic, dial-up, phone-line Internet access [which millions of people nationwide have rejected in favor of high-speed access, believing even that was too slow]. In short, the old network had become a serious detriment to the education of YISD students.

Once the high speed wide area network offering became reasonable and YISD could justify the expense in alignment with the updated version of the Technology Plan, YISD recognized that, if it chose to install a high-speed wide area network solution, it would no longer need the Routers for its network. Specifically, YISD would not need the Routers in the interim period because of the use of layer 3 switching in conjunction with the newer transport media [fiber optic cable] that was being used to deliver network access to the campuses. The Routers were not required anymore, under such high-speed wide area network.